

Respondent contends claimant injured only his left shoulder and is only entitled to benefits for the scheduled injury. Respondent argues the medical benefits should also be

limited to treatment for the left shoulder injury. Claimant contends he also injured his right shoulder and neck and is entitled to work disability and medical benefits as found by the ALJ.

Respondent initially listed an additional issue relating to temporary total disability benefits for the period May 25 through September 24, 1995. This issue was, however, withdrawn. No temporary total disability benefits were awarded for that period and claimant does not request those benefits on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and after considering the arguments, the Appeals Board finds and concludes the decision by the ALJ should be modified. The Board finds the evidence does not permit a determination of whether claimant's right shoulder problems constitute a permanent impairment. The Board, therefore, concludes claimant should be awarded benefits for permanent impairment to the left shoulder only.

Findings of Fact

(1) At the time of the accident in this case, claimant worked 12-hour shifts from 7 p.m. to 7 a.m. In the early morning hours of February 10, 1995, claimant injured his left shoulder when he fell from scaffolding. Claimant did not injure any other part of his body at the time of the fall.

(2) When claimant went in on the evening of February 10, 1995, he asked for referral to a physician. Respondent sent claimant to the Bates County Memorial Hospital emergency room. The emergency room physician prescribed pain pills and recommended light duty. Claimant stayed home the remainder of February 10 but went to work the following night. Claimant then worked several shifts on light duty but was laid off February 13. Claimant went to see Dr. Jeffrey M. VanBiber on February 14.

(3) After the layoff, claimant took a general foreman job for another employer in Sibley, Missouri. As foreman, claimant supervised approximately 18 employees. He did not do physical labor. Claimant worked in Sibley for approximately 11 to 12 weeks. Claimant's shoulder continued to bother him while he worked in Sibley.

(4) After leaving the job in Sibley, claimant asked respondent for additional medical treatment. Respondent denied the request. Claimant filed for a preliminary hearing, and the ALJ ordered respondent to provide treatment. Pursuant to the preliminary hearing order, respondent sent claimant to Larry F. Frevert, M.D. Dr. Frevert first saw claimant August 16, 1995. Claimant did not receive medical treatment or see a physician from the time he saw Dr. VanBiber on February 14, 1995, until he saw Dr. Frevert in August 1995.

(5) Dr. Frevert initially diagnosed impingement syndrome and possible rotator cuff tear and/or adhesive capsulitis of the left shoulder. He recommended physical therapy. An arthrogram confirmed a torn rotator cuff in the left shoulder and Dr. Frevert performed surgery on November 30, 1995. The first surgery produced inadequate results and Dr. Frevert performed a second surgery for the left shoulder on June 13, 1996. In the second surgery, he removed scar tissue that was limiting claimant's motion.

(6) Claimant began experiencing right shoulder and neck pain in approximately January of 1996.

(7) Dr. Frevert's records do not mention the right shoulder complaints until September 6, 1996. But Dr. Frevert testified it seemed to him claimant had complained about the right shoulder before this date. He thought he did not record those complaints because he was treating only the left shoulder. When claimant mentioned the right shoulder in September 1996, claimant indicated he did not desire to have treatment for the right shoulder.

(8) On October 9, 1996, Dr. Frevert released claimant from care for the left shoulder injury and released claimant to return to work restricted to no lifting over 5 pounds, no overhead activity, and no pushing or pulling with the left arm.

(9) On December 13, 1996, P. Brent Koprivica, M.D., examined and evaluated claimant. Dr. Koprivica gave ratings for the neck and the right and left upper extremities. He rated the neck, which he diagnosed as chronic cervical pain, as 13 percent of the whole person. The left upper extremity he rated as 50 percent of the extremity and converted this to 30 percent of the whole person. The right upper extremity he rated as 11 percent of the extremity or 7 percent of the whole person. Dr. Koprivica combined these ratings to arrive at a total rating of 43 percent of the whole person. Dr. Koprivica also opined that the neck and right upper extremity problems resulted from compensating for the original left upper extremity injury. At the time of Dr. Koprivica's examination, claimant had not received treatment for either his neck or right shoulder. Dr. Koprivica suggests in his report that claimant is not, given the response to surgery on the left shoulder, a good candidate for surgery on the right shoulder and would best be treated in a conservative fashion.

(10) On April 2, 1997, Steven L. Hendler, M.D., conducted an independent medical evaluation at the request of the ALJ. The April 14, 1997, report from Dr. Hendler's examination was admitted without deposition. In that report, Dr. Hendler rates claimant's impairment as 39 percent of the left upper extremity. Dr. Hendler also states that the neck and right shoulder problems were not caused by the work injury:

"The right rotator cuff injury and the myofascial pain on the neck are not caused [sic] related to the work injury as described."

(11) On April 30, 1997, claimant returned to Dr. Frevert with complaints of pain in his right shoulder, right side, and neck. He also complained of numbness and tingling in both hands and pain running down both arms. Dr. Frevert ordered an MRI and referred claimant to Robert Takacs, M.D., for evaluation of the neck complaints. Dr. Frevert asked for evaluation of the neck problem, in part, to determine whether there might be a neck injury that was also causing the right shoulder symptoms.

(12) On May 5, 1997, and again on June 2, 1997, Dr. Takacs examined claimant to evaluate the neck complaints. Dr. Takacs concluded the neck problems were from a strain and were temporary. At the time of the second visit, Dr. Takacs found no loss of motion in the neck and claimant reported no pain. Dr. Takacs did not think the neck was injured at the time of claimant's accident. Based on the history, Dr. Takacs believed the neck was strained during the therapy for the left shoulder. Dr. Takacs also concluded the neck injury was not the cause of the right shoulder complaints.

(13) Dr. Frevert last examined claimant May 9, 1997, between the two examinations by Dr. Takacs. At the time of this last visit, Dr. Frevert had the results of the MRI examination. The MRI showed degenerative arthritic changes around the right AC joint. In the notes from that visit, Dr. Frevert states his opinion that the right shoulder complaints are probably indirectly related to the overuse during therapy for the left shoulder:

In discussing as far as the right shoulder and what has caused this, he [claimant] states that he has never really had problems with the right shoulder before the accident and did not have problems with the shoulder until starting therapy when he had to do a bunch of activity with the right arm to help the left arm along. Therefore, I feel it is probably indirectly related to that with an overuse.

(14) Dr. Frevert expressed no opinion about the degree of impairment in claimant's right upper extremity. He testified he did not know whether the right upper extremity problems were permanent.

Conclusions of Law

(1) The Board finds claimant has suffered permanent disability to his left shoulder as a result of accidental injury arising out of and in the course of his employment on February 10, 1995.

(2) For loss of use of the shoulder an employee is entitled to a maximum of 225 weeks of benefits. K.S.A. 44-510d.

(3) The Board concludes claimant has a 41 percent loss of use of the left shoulder. In reaching this conclusion, the Board has given approximately equal weight to the opinions

of Dr. Koprivica (50 percent impairment), Dr. Hendler (39 percent impairment) and Dr. Frevert (35 percent impairment).

(4) The Board finds, based on the opinion of Dr. Takacs, claimant suffered a temporary injury to his neck from physical therapy for the left shoulder but has no permanent impairment in his neck either as a direct or indirect result of his compensable injury.

(5) The Board concludes claimant also suffered injury to his right shoulder caused by overuse of the right upper extremity and shoulder to compensate for the injury to the left shoulder. The Board concludes, however, that, from the evidence presented, one cannot determine whether the injury was or was not permanent. The Board finds the right shoulder problems were an indirect result of the left shoulder injury, i.e., caused by overuse to compensate for the left shoulder, based on the testimony of both Dr. Koprivica and Dr. Frevert. Both agreed with this conclusion. But Dr. Koprivica and Dr. Frevert give different opinions on the permanency from the injury. Dr. Koprivica provides a permanent disability rating. Dr. Frevert, who saw claimant after Dr. Koprivica, indicates he cannot determine whether the injury to the right shoulder is permanent. The Board finds more reliable here the opinion expressed by Dr. Frevert. As indicated, Dr. Frevert saw claimant last. In addition, at the time Dr. Koprivica saw claimant, Dr. Koprivica suggested conservative treatment for the right shoulder. Claimant has not, therefore, shown the nature and extent of permanent injury, if any, for the right shoulder injury.

(6) Based on the above conclusions, the Board also concludes claimant is entitled to medical treatment for the right shoulder injury at respondent's expense.

(7) Once the right shoulder injury is established to be at maximum medical improvement, claimant may be entitled to review and modify this award, depending upon whether there is or is not permanent disability to the right shoulder.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler, dated February 17, 1998, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Warren A. Jessee, Sr., and against the respondent, RCI Riley Construction, and its insurance carrier, National Union Fire Insurance Company, for an accidental injury which occurred February 10, 1995, for 61 weeks of temporary total disability compensation at the rate of \$319 per week or \$19,459.00, followed by 67.24 weeks at the rate of \$319 per week or \$21,449.56, for a 41% permanent partial disability of the left shoulder, making a total award

of \$40,908.56, all of which is presently due and owing in one lump sum less amounts previously paid.

The Appeals Board adopts all other orders by the Administrative Law Judge not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen K. Nordyke, Butler, MO
Karen D. Pendland, Kansas City, MO
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director